Allied Bank (M) Sdn Bhd v Yau Jiok Hua

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M–02–105 OF 1998

MOHD GHAZALI, HASHIM YUSOFF AND MOHD NOOR ABDULLAH JJCA

24 MAY 2006

Banking — Banks and banking business — Loan agreement — Terms — No terms in loan agreement relating to personal service of notices of demand — Whether court could read such term into the loan agreement

Banking — Banks and banking business — Overdraft facility — Loan repayable 'on demand' — Whether service of notice of demand on principal borrower a pre-requisite to commencing legal action to recover loan — Whether a writ of summons a notice of demand in itself

Evidence — Documentary evidence — Admissibility of — Civil case — Maker of documents not called as he had left the country — Whether such documents were admissible under s 73A Evidence Act 1950 — Whether trial judge possessed discretion to admit documents

The appellant bank commenced action to recover from the respondent amounts due and owing on a loan granted to the respondent. The evidence on record indicated that the appellant had through its solicitors issued four notices of demand by way of registered post to the respondent's address. AR cards showing that the notices were sent and received were also adduced as evidence. A letter (ID11) sent by the appellant's solicitors acknowledging that the respondent had made part-payment was also admitted as evidence. PW1 — a legal assistant for the appellant's solicitors — introduced the notices of demand and ID11. PW1 also testified that most of the notices were issued by one Thevarajah — a former legal assistant with the appellant's solicitors. PW2 — the appellant's manager confirmed instructing the solicitors to issue the notices of demand. PW2 also testified that the said Thevarajah had drafted most of the notices and ID11 but had since left the firm of solicitors to migrate to Australia. PW3 — also a legal assistant from the appellant's firm of solicitors — testified that he had issued the notice of demand marked as exh P15. The evidence of PW1, PW2 and PW3 stood unchallenged. At first instance, the High Court held most of the notices of demand (except P15) and ID11 inadmissible on the ground that Thevarajah was not called to give evidence. The High Court then held that since the appellant had failed to prove that a notice of demand in respect of its claim against the respondent had been served upon the respondent, the appellant had not succeeded in establishing a cause of action against him. The High Court also held that the notices of demand had to be served upon the respondent personally. The appellant thus appealed to the Court of Appeal.

Held, allowing the appeal with costs (by a majority):

(1) The judicial commissioner (JC) was wrong in law and in fact in refusing to admit in evidence the notices of demand, the AR cards and ID11. The JC should not have totally disregarded the evidence of PW1, PW2 and PW3 in considering the admissibility of the notices of demand. Such evidence was admissible pursuant to s 73A of the Evidence Act 1950. Further the JC had also a discretion to admit in evidence the notices of demand notwithstanding that the maker was not called. In the instant case, the conditions laid down by s 73A were satisfied and hence the notices of demand were admissible. The evidence of PW1 and PW2 also stood unrebutted and unchallenged and on a balance of probabilities that should have been sufficient for the JC to hold that a demand had been made and received by the respondent. The letter of demand prepared and sent by registered post by PW3 (exh P15) and which was held to be admissible was sufficient proof that a notice of demand was served on the respondent (see para 17).

(2) The ruling that the notices of demand had to be served personally upon the respondent could not be comprehended. There was no express provision for personal service amongst the terms and conditions in the loan of agreement. Such a ruling would be tantamount to importing a term into the agreement. The court could not under the circumstances of the case read into the agreement such a term or condition (see para 17).

(3) In the instant case, there was no requirement for a notice of demand to be sent to the respondent who was the principal borrower. There was a pre-existing debt which was payable 'on demand'. Such a demand, other than the service of proceedings, was not a pre-requisite to the bringing of an action to recover the debt. The writ is a notice of demand in itself. The JC failed to appreciate that this was a claim against a principal debtor and not a guarantor. A separate and proper notice of demand has to be given to a guarantor because he is being sued on a collateral contract. However, where the borrower himself or the principal debtor is being sued, the writ itself is sufficient demand (see para 24).

(4) The JC had made an erroneous decision in dismissing the appellant's claim. The facts clearly showed that the appellant was not suing for compensation for breach of a contract in writing but for monies loaned under an overdraft. Under such circumstances, no demand was necessary (see para 25).

[Bahasa Malaysia summary

Perayu bank telah memulakan satu tindakan untuk mendapat balik daripada responden jumlah yang perlu dibayar dan terhutang atas satu pinjaman yang telah diberikan kepada responden. Keterangan atas rekod menunjukkan bahawa perayu melalui peguamnya telah mengeluarkan empat notis tuntutan melalui pos berdaftar ke alamat responden. Kad-Kad AR menunjukkan bahawa notis-notis tersebut telah dihantar dan diterima dan juga telah dikemukakan sebagai keterangan. Sepucuk surat (ID11) telah dihantar oleh peguam perayu mengesahkan yang mana responden telah membuat bayaran separa juga dimasukkan sebagai keterangan. PW1 — pembantu undang-undang kepada peguam perayu — telah mengemukakan notis-notis tuntutan tersebit dan ID11. PW1 juga memberi keterangan bahawa notis-notis

tersebut telah dikeluarkan oleh Thevarajah — bekas pembantu undang-undang dengan peguam perayu. PW2 — pengurus perayu mengesahkan telah memberi arahan kepada peguam untuk mengeluarkan notis tuntutan. PW2 juga memberi keterangan bahawa Thevarajah telah mendrafkan kebanyakan notis-notis itu dan ID11 tetapi telah meninggalkan firma guaman tersebut dan berpindah ke Australia. PW3 — juga seorang pembantu undang-undang daripada firma peguam perayu — memberi keterangan bahawa beliau telah mengeluarkan notis tuntutan bertanda sebagai eksh P15. Keterangan PW1, PW2 dan PW3 tidak dicabar. Pada mulanya, Mahkamah Tinggi memutuskan kebanyakan notis-notis tuntutan (kecuali P15) dan ID11 tidak boleh diterima atas alasan bahawa Thevarajah tidak dipanggil untuk memberi keterangan. Mahkamah Tinggi kemudian telah memutuskan bahawa memandangkan perayu telah gagal untuk membuktikan bahawa suatu notis tuntutan berkaitan tuntutannya terhadap responden telah diserahkan ke atas responden, perayu tidak berjaya untuk membuktikan satu kausa tindakan terhadapnya. Mahkamah Tinggi juga telah memutuskan bahawa notis-notis tuntutan tersebut telah diserahkan kepada responden secara peribadi. Perayu berikutan itu telah merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos (dengan majoriti):

(1) Pesuruhjaya Kehakiman (PK) terkhilaf dari segi undang-undang dan fakta kerana enggan menerima keterangan notis-notis tuntutan, kad-kad AR dan ID11. PK tidak sepatutnya menolak terus keterangan PW1, PW2 dan PW3 dalam mempertimbangkan kebolehterimaan notis-notis tuntuta tersebut. Keterangan sedemikian boleh diterima menurut s 73A Akta Keterangan 1950. Bahkan PK juga mempunyai budi bicara untuk menerima keterangan notis-notis tuntutan itu meskipun pembuatnya tidak dipanggil. Dalam kes semasa, syarat-syarat yang dinyatakan dalam s 73A telah dipenuhi dan justeru itu notis-notis tuntutan tersebut boleh diterima. Keterangan PW1 dan PW2 juga tidak dipatahkan atau dicabar dan atas imbangan kebarangkalian yang adalah memadai untuk PK memutuskan bahawa satu tuntutan telah dibuat dan diterima oleh responden. Surat tuntutan yang disediakan dan dihantar melalui pos berdaftar oleh PW3 (eksh P15) dan yang diputuskan sebagai boleh diterima adalah bukti yang mencukupi bahawa satu notis tuntutan telahpun diserahkan ke atas responden (lihat perenggan 17).

(2) Keputusan bahawa notis-notis tuntutan tersebut telah diserahkan secara peribadi ke atas responden tidak boleh difahami. Tiada peruntukan nyata untuk penyampaian kediri antara terma-terma dan syarat-syarat dalam perjanjian pinjaman itu. Keputusan sedemikian sama seperti mengimport suatu terma ke dalam perjanjian tersebut. Mahkamah tidak boleh dalam keadaan kes tersebut membaca ke dalam perjanjian itu terma atau syarat sedemikian (lihat perenggan 17).

(3) Dalam kes semasa, tiada keperluan untuk satu notis tuntutan diserahkan kepada responden yang merupakan peminjam utama. Terdapat hutang yang sudah ada yang perlu dibayar 'on demand'. Tuntutan sedemikian, selain daripada pelaksanaan prosiding, bukan satu pra syarat untuk memulakan satu tindakan mendapat balik hutang itu. Writ itu adalah satu notis tuntutan

dengan sendirinya. PK telah gagal untuk memahami bahawa ini adalah satu tuntutan terhadap peminjam utama dan bukan penjamin. Satu notis tuntutan berasingan dan betul telah diberikan kepada penjamin kerana beliau telah disaman berdasarkan satu kontrak kolateral. Namun, di mana peminjam itu sendiri atau peminjam utama telah disaman, writ itu dengan sendirinya merupakan satu tuntutan yang memadai (lihat perenggan 24).

(4) PK telah membuat satu keputusan yang salah dengan menolak tuntutan perayu. Fakta jelas menunjukkan bahawa perayu bukan menyaman untuk mendapat pampasan kerana pelanggaran kontrak bertulis tetapi untuk wang yang dipinjam di bawah satu overdraf. Dalam keadaan sedemikian, tiada tuntutan adalah perlu (lihat perenggan 25).]

Notes

For cases on admissibility of documentary evidence, see7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1048–1056.

For cases on loan agreement, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1985–1987.

For cases on overdraft facility, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2000–2011.

Cases referred to

Kwong Yik Bank Bhd v Transbuilder Sdn Bhd & Ors [1989] 2 MLJ 301 (refd)
Malayan Banking Berhad v Lim Chee Leng & Anor [1985] 1 MLJ 214 (refd)
Sim Siok Eng v Kong Ming Bank Berhad [1980] 2 MLJ 21, (refd)

Legislation referred to

Evidence Act 1950 s 73A

Dato' Vijay Kumar (Kumar Jaspal Quah & Aishah) for the appellant.
Respondent in person (Yau Jiok Hua & Co).

Mohd Ghazali JCA:

[1] This is the majority judgment of the court.

[2] The appellant, a local bank, granted a secured loan of RM500,000 to the respondent, an advocate and solicitor, on an overdraft basis subject to certain terms and conditions contained in a letter of offer dated 20 March 1984. Amongst the terms and conditions were the following:

2. Interest: Adjustable, presently at 14.5% pa on monthly rest.

3. Terms: 1 year.

4. *Maturity: 1 year from the date of the first drawdown.*

8. *Repayment:*

On Demand. You are to deposit at least $6,500.00 per month into the account to keep interest current and account active.

9. Security:

Against registered 1st legal charge on properties held under the following Titles Nos:

a) GFS 17064, Lot No. 280, Town Area XVIII Central District, Malacca.

b) SG 16099, Pt Lot No. 190, Mukim of Bukit Baru, Central District, Malacca.

c) HS(D) 5079, Plot No. 190, Town Area XX, Central District, Malacca.

16. Capitalisation of interest:

The interest is to be serviced monthly. Any non payment of the interest as stipulated shall cause it to be capitalised and added to the principal sum with interest chargeable thereon at the same rate as prescribed above.

17. Default charges:

At any one time, the loan outstanding shall not exceed the approved limit. Any excess amount shall be subjected to the default charges at 1 times and above interest rate and shall take effect from the date prescribed on the notice. (Emphasis added.)

[3] The respondent subsequently defaulted. By writ of summons dated 9 January 1991, the appellant sued the respondent for the sum of RM1,192,484.83 and interest at the rate of 13% pa on monthly rests calculated from 1 December 1990 to date of realisation and costs. In his statement of defence, the respondent, inter alia, disputed the claim of the appellant that a notice of demand was sent to his goodself. That seemed to be the only defence canvassed.

[4] The notes of proceedings showed that the trial commenced on 26 August 1997. At the outset of the trial, the parties informed Augustine Paul JC (as he then was) that the following are agreed facts, namely:

(i) the loan, the subject-matter of the suit, was disbursed to the respondent;

(ii) the letter of offer and the three charge documents were duly executed.

[5] At the end of the day, the learned JC dismissed the appellant's case on the ground that as the appellant has failed to prove that the respondent was served with a notice of demand in respect of the claim against him, it has not succeeded in establishing a cause of action against him. In his grounds of judgment, the learned JC said:

> In this case, t*here is no evidence of any agreement between the parties with regard to the mode of service of the notice of demand*. The only provision on this issue is contained in the letter of offer which merely states that repayment shall be on demand without condescending to particularise the form of service. *This, to my mind, means that the notice of demand must be served personally on the defendant in the absence of any agreement to the contrary*.
>
> *I therefore hold that in the absence of any agreement to the contrary between the parties in this case there must be personal service of the notice of demand on the defendant. The evidence shows that the mode of service attempted by the plaintiffs was through the post.* Consequently, it is my view that the plaintiffs have failed to establish service of the notices on the defendant. In any event they have failed to prove service of the notice of demand even on the mode of service adopted by them.
>
> As the plaintiffs have failed to prove that the defendant has been served with a notice of demand in respect of their claim against him they have not succeeded in establishing a cause of action against him. (Emphasis added.)

[6] The learned JC seems to be of the view that a demand was a pre-requisite to recovery under the circumstances of this instant appeal; he found that no demand was made by the appellant and hence held that the appellant was not entitled to recover the loan that it gave to the respondent.

[7] The facts showed that the overdraft facility had a maturity period of one year from the date of the first drawdown. It is not disputed that the drawdown was on 25 June 1984 and accordingly, the overdraft facility matured on 24 June 1985. The facts also showed that the appellant did send notices of demand to the respondent but these notices were held inadmissible by the learned JC for various reasons. All the notices of demand were sent to the respondent to his address which is the same address as that of his legal firm. The notices of demand were as follows:

(i) a notice of demand dated 6 August 1985, marked only for identification (ID6) by the court, from the appellant's solicitors to the respondent informing him that as at 31 July 1985, an amount of RM549,115.52 was due and owing to the appellant together with further interest at the rate of 15% per annum on monthly rests from 1 August 1985 and that an additional interest at the rate of 1.33 times over and above the stated rate of interest shall also be payable on all excesses above the approved limit, and demanding for payment to be made within seven days of receipt of the letter failing which legal action will be taken; an AR card showing that this notice of demand was sent by registered post was marked as exh P7 by the court;

(ii) a Form 16E issued pursuant to s 255 of the National Land Code ('the Code') dated 6 August 1985, marked only for identification (ID8) by the court, which was sent by the appellant's solicitors to the respondent; s 255(1) of the Code provides 'where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make a demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may forthwith apply for an order for sale without being required to serve a notice in Form 16D under sub-s (1) of s 254'; an AR card showing that this notice was sent by registered post was marked as exh P10 by the court;

(iii) a notice of demand dated 14 August 1986, marked only for identification (ID13) by the court, from the appellant's solicitors to the respondent informing him that as at 31 July 1986 an amount of RM596,663.71 was due and owing to the appellant together with further interest at the rate of 15% pa on monthly rests from 1 August 1986 and that an additional interest at the rate of 1.33 times over and above the stated rate of interest shall also be payable on all excesses above the approved limit, and demanding for payment to be made within seven days of receipt of the letter failing which legal action will be taken; this notice of demand also stated that foreclosure proceedings will be instituted if the said sum is not paid within seven days thereof; an AR card showing that this notice of demand was sent by registered post was marked only for identification (ID14) by the court;

(iv) a notice of demand dated 21 November 1986, marked only for identification (ID17) by the court, from the appellant's solicitors to the respondent informing him that as at 31 October 1986 an amount of RM625,079.88 was

due and owing to the appellant together with further interest at the rate of 15% per annum on monthly rests from 1 November 1986 and that an additional interest at the rate of 1.33 times over and above the stated rate of interest shall also be payable on all excesses above the approved limit, and demanding for payment to be made within seven days of receipt of the notice failing which legal action will be taken; an AR card showing that this notice of demand was sent by registered post was also marked only for identification (ID18) by the court.

[8] A notice of demand dated 2 August 1990 from the appellant's solicitors to the respondent informing him that as at 16 July 1990 an amount of RM1,136,859.28 was due and owing to the appellant together with further interest at the rate of 13% per annum on monthly rests to be charged with effect from 17 July 1990 until full and final settlement was admitted in evidence as was marked as exh P15 by the court. This notice of demand was also sent by registered post.

[9] In the course of the trial, the appellant also attempted to introduce a letter dated 19 September 1985 written by its solicitors to the respondent sent by registered post. This letter and the AR card were marked only for identification (ID11 and ID12 respectively) by the court; this letter, inter alia, reads:

> We have been informed by our client that you have settled a sum of M$13,000 on 4 September 1985. They have accepted your payment on a Without Prejudice basis upon their right to institute foreclosure proceedings, should you default in any of the monthly payment effective from October 1985.
>
> TAKE NOTE in the event foreclosure proceedings are commenced you will be liable for ALL FURTHER COSTS incurred.

[10] All the above notices of demand, except for the notice of demand marked as exh P15, were held to be inadmissible in evidence by the learned JC. He then held as the appellant has failed to prove that the respondent was served with a notice of demand in respect of its claim against him, the appellant have not succeeded in establishing a cause of action against him and 'in the upshot, I dismiss the plaintiff's claim with costs'.

[11] The appellant appealed. We are of the view that the main issue in the instant appeal is whether a demand was a pre-requisite to recovery to entitle the appellant to recover its loan given to the respondent. The other issue is on the admissibility of the notices of demand. We would approach the second issue first.

[12] As discussed earlier, the appellant attempted to adduce in evidence four notices of demand which were sent to the respondent by registered post to his address, namely, 116A, Jalan Munshi Abdullah, Melaka which is also the address of his legal firm. The notes of proceedings showed that in his evidence, PW1, a legal assistant from the legal firm of Messrs Nordin Hamid & Co who were then acting for the appellant, introduced the said notices of demand sent to the respondent by registered post and also the AR cards. PW1 stated that the said notices of demand were issued by one Mr Thevarajah who was then a legal assistant with Messrs Nordin

Hamid & Co PW2, the appellant's manager who have personal knowledge of the respondent's overdraft account from day one testified that he instructed Messrs Nordin Hamid & Co to issue the various notices of demand and that as a consequence of it, the respondent approached the appellant together with his solicitors, Messrs Thakurta & Low to negotiate a settlement. He then instructed Messrs Nordin Hamid & Co to hold in abeyance any action until further notice as the respondent made some part-payments. That the respondent made part-payment can be seen from the letter dated 19 September 1985 (ID11) but that letter was held to be inadmissible by the learned JC for the same reason, namely, that the author, Mr Thevarajah was not called to give evidence. PW2 also confirmed that the said Mr Thevarajah was then handling the matter and was the author of most of the notices of demand. He stated that the said Mr Thevarajah have since left Messrs Nordin Hamid & Co and migrated to Australia. PW3, another legal assistant from Messrs Nordin Hamid & Co stated that he issued a letter of demand dated 2 August 1990; this letter was admitted as an exhibit by the court and marked as exh P15.

[13] Both PW1 and PW2 were never cross-examined by the respondent. The respondent had however objected to the admissibility of the said notices of demand on the ground that the maker *viz*, the said Mr Thevarajah was not called to give evidence. The learned JC consequently refused to allow the said notices of demand and also the AR cards to be admitted in evidence.

[14] In his evidence, the respondent denied having received any of the notices of demand although he admitted that the AR cards bore his office rubber stamp which, to us, would clearly denote that the said notices were received by him. He stated that his legal firm was a sole proprietorship but insisted that he could not identify any of the signatures or initials on the AR cards. He later insisted that the rubber stamps appearing on the AR cards which bore the name of his legal firm were not that of his firm as his office rubber stamps bear the address of his legal firm. The respondent did not however substantiate this averment by, for example, producing his office rubber stamps in use at the material time. The learned JC did not also deal with this serious allegation which, to me, would seemed to imply that the rubber stamps found on the AR cards were concocted or were fakes.

[15] Having ruled that the said notices of demand and the letter dated 19 September 1985 (ID11), which reflected that the respondent made a part-payment of RM13,000 on 4 September 1985 were inadmissible, the learned JC held that as the appellant have failed to prove that the respondent had been served with a notice of demand in respect of its claim against him, the appellant have not succeeded in establishing a cause of action against him. He also ruled that there must be personal service of the notices of demand on the respondent and that the appellant cannot serve it through the postal system.

[16] We are of the view that the learned JC was wrong in law and in fact in refusing to admit in evidence the said notices of demand and the AR cards and also the letter marked as ID11. PW1 gave evidence on this matter from the records available from the case-file of Messrs Nordin Hamid & Co PW1 had proper custody of the notices of demand and hence was a competent witness to produce them. He is a legal

assistant and an officer of the court and has no pecuniary interest in the matter. To imply or even suggest that the legal firm of Messrs Nordin Hamid & Co concocted or falsified the respondent's rubber stamp imprints appearing on the AR cards would be preposterous. In his evidence, PW2, the appellant's manager, testified that he was not sure of the whereabouts of the said Mr Thevarajah apart from the fact that the latter had migrated to Australia and that he did consider looking for him but did not do so due to cost effectiveness. The respondent did not challenge the evidence of PW1 and PW2. Be that as it may, we are of the view that the notice of demand prepared by PW3 and sent by registered post (exh P15), having been admitted in evidence, would be sufficient to show that a demand had been made.

[17] Under the circumstances of the instant appeal, we would think that the learned JC should not totally disregard the evidence of PW1, PW2 and PW3 in considering the issue of admissibility of the said notices of demand. Such evidence would be admissible pursuant to the provisions of s 73A of the Evidence Act 1950 ('the Act') and the learned JC has a discretion to admit in evidence the said notices of demand notwithstanding that the maker was not called. The said notices of demand formed part of the records of Messrs Nordin Hamid & Co and are in their care and custody. We are of the view that on the balance of probabilities, this being a civil suit, the notices of demand and the AR cards are admissible and should have been admitted in evidence. Its existence was never challenged by the respondent and his objection as to its admissibility as the maker was not called should have been overuled forthwith. After all, the proviso to s 73A(1) of the Act does provide that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is, *inter alia*, beyond the seas and that it is not reasonably practicable to secure his attendance. The conditions laid down by s 73A of the Act were satisfied under the circumstances of this instant appeal and hence the notices of demand are admissible. Further, the evidence of PW1 and PW2 stood unrebutted and unchallenged and thus, on a balance of probabilities, that alone should have been sufficient for the learned JC to hold that a demand had been made and received by the respondent. Consequently, the letter of demand prepared and sent by registered post by PW3 (exh P15) and which was held to be admissible is sufficient proof that a notice of demand was served on the respondent. The learned JC however totally disregarded this evidence without giving any reasons thereto and instead went on to rule that the notices of demand must be personally served on the respondent, ie, it cannot be sent by post. We cannot comprehend such a ruling. There is no express provision for personal service amongst the terms and conditions stated in the letter of offer which is the agreement and such a ruling would tantamount to importing a term into the agreement. We do not think that the court could under the circumstances of this case read into the agreement such a term or condition. In conclusion, we would hold that the learned JC was wrong in law and in fact in not admitting in evidence the said notices of demand and the AR cards. On the evidence, the demand was received by the respondent or his office staff, ie, his servant or agent and the learned JC should have held that a valid demand has been made. We would accordingly rule that the said notices of demand and the AR cards are admissible and that a proper demand had been made under the circumstances of the instant appeal.

[18] We would now deal with the issue as to whether, under the circumstances of this case, a demand was a pre-requisite to entitle the appellant to recover its loan of monies to the respondent. Amongst the terms and conditions of the overdraft facility granted were the following:

4. *Maturity*: 1 year from the date of the first drawdown.

8. *Repayment*:

> *On Demand*. You are to deposit at least RM6,500.00 per month into the account to keep interest current and account active. (Emphasis added.)

[19] What is clear from the above is that the overdraft facility had a maturity period of one year from the date of the first drawdown. The first drawdown was on 25 June 1984 and hence, the overdraft facility matured on 24 June 1985. Repayment is 'on demand'. The words 'on demand' was dealt with in detail in *Kwong Yik Bank Bhd v Transbuilder Sdn Bhd & Ors* [1989] 2 MLJ 301 In that case, the facts showed that the plaintiff, a bank granted an overdraft facility to a limit of RM100,000 with interest at 15% pa with monthly rests to the first defendant, a company which was in the business of housing construction. The overdraft facility was secured by a joint and several guarantee of the second to the fifth defendants who were directors of the first defendant. The 1st defendant defaulted and consequently the plaintiff gave notice, dated 18 December 1982, to the first defendant that it required the balance and outstanding interest to be settled within seven days and that if the demand was not complied with they would be proceeding with legal action against the defendants. Carbon copies of that letter were sent to the second to the fifth defendants. All the defendants ignored this notice. Eventually, judgment in default of appearance was obtained by the plaintiff against the first defendant and the second, fourth and fifth defendants. Against the third defendant, the plaintiff obtained summary judgment. The third defendant appealed. Before the High Court, counsel for the third defendant contended the following:

(a) before a guarantor's liability could be said to arise, a clear and unequivocal demand must be made setting out the exact sum which has to be paid;

(b) there was no cause of action because no proper demand had been made; in relation to this, it was submitted that the plaintiff's letter dated 18 December 1982 was not the proper demand;

(c) the plaintiffs were not entitled to judgment for more than RM100,000 under the guarantee.

[20] In dismissing the third defendant's appeal, Shankar J said:

> In other words, the issue as to whether a prior demand is a condition precedent to the creation of liability in a guarantor, must depend on the precise terms of the contract. Indeed the two Canadian cases which Mr Nadkarni cited brings this out very clearly.
>
> In *Royal Bank of Canada v Oram & Ors*, it was held that unless the demand for payment had been made, an action in court would be premature. But then the words of that guarantee read as follows (see p 569):

A

> No suit based on this guarantee shall be instituted until demand of payment has been made …

The same form of words occur in *Royal Bank of Canada v Ruben* at p 708. There are no such words in the letter of guarantee signed by the third defendant. Consequently I hold that this line of argument is devoid of merit.

B

[21] Further on in his judgment, Shankar J said:

In *Re J Brown's Estate*; *Brown v Brown* at p 304 Chitty J said:

C

> … without going through the whole of the cases to which I have referred in the course of the argument, it is plain that a distinction has been taken and maintained in law, the result of which is that where there is a present debt and a promise on demand, *the demand is not considered to be a condition precedent to the bringing of the action.* But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought … it is a question, then, of the construction of the instrument; … (Emphasis added.)

D

In *Mok Hin Wah v UMBC Tun Haji Mohamed Salleh bin Abas*, the Lord President, referred to *Bradford Old Bank Ltd v Sutcliffe*. The critical passage in the judgment of Scrutton LJ is at p 848 which reads as follows:

E

> Was is here necessary for the plaintiff to prove a demand? Generally a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated it should be made: per Parke B in *Walton v Mascall. Even if the word 'demand' is used in the case of a present debt, it is meaningless, and express demand is not necessary*, as in the case of a promissory note payable on demand: *Norton v Ellan*. But it is otherwise where the debt is not present but to accrue, as in the case of a note payable three months after demand: Re Rutherford; or where the debt is not a present debt, but a collateral promise: *Birks v Trippet*; *Re Brown's Estate*. The promise of a surety to pay on demand if his principal does not appear to me to be a collateral promise within the authorities; and I entertain no doubt that in this guarantee the provisions about demand are a real stipulation, and not mere words.

F

It seems to me that what is critical in such cases is the language of the instrument and the nature of the liability which it creates. Thus in *Esso Petroleum v Alstonbridge Properties* at p 1483 Walton J observed in the circumstances of that case:

G

> I fully accept, of course, that where there is a pre-existing debt which is payable 'on demand', *such a demand (other than the service of proceedings) is not a prerequisite to the bringing of an action to recover that debt: Re Brown's Estate*; *Brown v Brown*. That case shows, of course, that where the character in which payment is required is that of surety, a demand is, in general, necessary; *but I assume for* present purposes (without finding it necessary so to decide) *that the provisions of cl 5 of the mortgage,* equating the liability of the sureties to that of principal debtor, *is effective to obviate the necessity for a demand merely on this ground.* My difficulty is that the demand in the case is a demand which of its own intrinsic nature changes the nature of the liability; it turns a liability to pay by instalments into a liability to pay the whole at once. Under these circumstances, in my judgment, even as against a principal debtor, a demand antecedent to the issue of proceedings is a necessary prerequisite of, the whole cause of action. I would put it in this way, that where the pre-existing obligation is to pay the debt by instalments, the demand that it be paid in one lump sum is an act which radically changes the nature of the debtor's obligation, and so is an essential ingredient of any cause of action to recover the lump sum …

H

I

> Whatever else needs to be said on the law, I have already said in *Public Bank Bhd v Chan Siok Lie & Ors*.

If I may now focus my attention on the facts, it will be observed from the very first clause of guarantee that the obligation of the third defendant was not a collateral promise to pay on demand if the primary debtor did not pay. The clause in question imposed a primary and parallel obligation on the first defendant and all the guarantors to pay on demand all moneys owing to the bank. Clause 14 made each of the guarantors a principal debtor. And the terms of the document was such that the debt envisaged on demand was a present debt and not one which was payable by instalments being converted into an accelerated obligation to pay the whole at once.

In these circumstances my view is that no antecedent demand was required to create a cause of action and the mere filing of the writ and the service thereof was a sufficient demand obliging the defendants to pay. In any event I would go further and hold in the circumstances of this case that the letter dated 18 December 1982 was a demand on the third defendant as well as all the other directors of the company and the company itself. (Emphasis added.)

[22] In *Sim Siok Eng v Kong Ming Bank Berhad* [1980] 2 MLJ 21,, which was referred to by learned counsel for the appellant in his submission, the Federal Court held that the words 'on demand' do not by themselves make a demand a term of the contract. In that case, a bank brought an action for repayment of the whole sum owing on an overdraft. One of the issues raised is whether a demand is necessary to create a cause of action. In delivering the judgment of the Federal Court, Chang Min Tat FJ said (at p 22):

> It is to be realised however that the *Swiss Bank* case was not directly under the Statute of Limitations and turned entirely on the question whether demand is necessary to create a cause of action against a bank on a current account. The Court of Appeal held that the necessity for demand in the case of a current account was not established by authority but that it must be implied from the relation of banker and customer that demand is necessary. This case is therefore to be distinguished from a case such as this of a customer owing money to the bank on an overdraft. It is settled that a bank cannot recover a dormant overdraft after the period of limitation from the last advance had expired: *Parr's Banking Co v Yates*.

However, in the *Swiss Bank* case, Atkin LJ said, generally:

> The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract? If they did, effect will be given to that contract, whether it is a direct promise to pay or a collateral promise, though in seeking to ascertain their intention, the nature of the demand may be material.

Thus, it is a question of ascertaining the intention of the parties.

For ourselves in the case of an overdraft on a current account, we agree, with respect, with what Garth CJ said in Ram Chunder Ghosaul v Juggutmonmohini Dabee at p 294 that:

> *Where a man promises to pay a sum of money, etc. on demand, which it is his duly to pay whether a demand be made or not, then the money becomes payable at once, and no demand is necessary before suing him for it; as for instance, in the case of money lent, and money due for goods sold or for work done.*

The words 'on demand' do not by themselves make a demand a term of the contract.

In *Norton v Ellam*, where the question was as to when the Statute of Limitations began to run on a promissory note payable with interest on demand, Parke B said:

> It is the same as the case of money lent payable upon request with interest where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all …. It is quite clear that a promissory note payable on demand is a present debt and is payable without demand, and the statute begins to run from the date of it.
>
> So in the case of an overdraft on a current account unless the parties stipulate clearly and other than by merely using the words 'on demand', that the amount shall be payable on demand being made, time runs from the last advance by the bank to the customer or from the last payment of interest or capital or both by the customer. And it is to be observed that in the overdraft account in the instant case, there is no use of the words 'on demand' and there is also no evidence or contention of any stipulation in the overdraft that a demand is an agreed condition before the debt becomes payable, and that this was a claim on the overdraft account. (Emphasis added.)

[23] In *Malayan Banking Berhad v Lim Chee Leng & Anor* [1985] 1 MLJ 214, which was also referred to by learned counsel for the appellant in his submission, the Federal Court held that the writ itself is a notice. In that case, the facts showed that the appellant, a bank sued the respondents who partners of a firm under a trust receipt which matured and became payable on 14 June 1975. The appellant applied for summary judgment but this was refused by the senior assistant registrar. The appellant appealed to the judge in chambers. He gave judgment for the appellants in the sum of RM27,245.82 but rejected the claim for interest in the sum of RM21,316.50. The appellant appealed against the refusal to grant them interest and the respondents appealed on the ground that there were triable issues. The appeal was allowed with costs and the cross appeal was dismissed with costs. In delivering the judgment of the Federal Court, Lee Hun Hoe CJ (Borneo), in relation to the issue on the failure of sending a notice of demand, said (at p 215):

> The learned judge considered that the sum of RM48,562.32 was payable by the defendants to plaintiffs as evidenced by the trust receipt and the statement of accounts and payments made by the defendants towards the discharge of their debt.
>
> We are, however, unable to agree with the learned judge when he said that the plaintiffs had failed to serve the defendants with the notice of demand for which, therefore, the plaintiffs should be denied the right of interest.
>
> The trust receipt matured and became due on 14 June 1975. No notice was necessary. The writ itself is a notice.

[24] Under the circumstances in the instant appeal, we are of the view that no notice of demand need even be sent to the respondent who is the principal borrower himself. There is a pre-existing debt which is payable 'on demand' and such a demand, other than the service of proceedings, is not a pre-requisite to the bringing of the action to recover the debt. The writ is a notice of demand in itself. The learned JC failed to appreciate that this was a claim against a principal debtor and not a guarantor. We would agree that a separate and proper notice of demand has to be given to a guarantor because he is being sued on a collateral contract but where the borrower himself or the principal debtor is being sued, the writ itself is sufficient demand.

[25] On the whole, we would hold that the learned JC has made an erroneous decision in dismissing the appellant's claim. The approach by the learned JC should be on the construction of the appellant's letter of offer which was accepted by the respondent. The facts clearly showed that the appellant was not suing for compensation for breach of a contract in writing but for monies loaned under an overdraft. Under such circumstances, no demand was necessary and hence this appeal must be allowed with costs here and below. The deposit is to be refunded to the appellant.

[26] We heard this appeal on 17 August 2005 and after hearing arguments allowed the appeal by a majority with our learned brother Mohd Noor Abdullah JCA dissenting. Our learned brother Mohd Noor Abdullah JCA has since retired and we do not have the benefit of his minority view. Similarly, he did not have the benefit of reading this majority judgment before his retirement.

Appeal allowed with costs.

Reported by John Paul Simon